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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION SECOND DEPARTMENT OF THE STATE OF NEW YORK

AMICUS BRIEF IN SUPPORT OF RESPONDENT TOWN OF CLARKSTOWN SUBMITTED BY THE STATE OF OHIO ON BEHALF OF THE STATES OF ALASKA, ARIZONA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MONTANA, NORTH CAROLINA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, VIRGINIA, WISCONSIN AND THE COMMONWEALTH OF PUERTO RICO.

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STATEMENT OF INTEREST

The *Amici* States urge this Court to affirm the decision below because the ability to control the flow of solid waste within a community is vital to managing solid waste in a responsible, environmentally sound manner. The solid waste crisis facing communities across this country, a crisis of critical shortages and gluts of disposal capacity and an inability to decrease reliance on landfills, has been well documented, and has been growing worse since this Court first addressed the matter in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In the fifteen years since that seminal case, the problems surrounding safe, environmentally sound disposal of solid waste have only become more difficult and complex.

In order to address these complex problems, both state and federal governments have established goals and mandates for solid waste management. Many states have enacted comprehensive solid waste management statutes which contain these goals and mandates. Typically, the goals and mandates are implemented on a local level. Such an arrangement respects local government's traditional primary role in handling local solid waste issues.

As part of their comprehensive programs, States have enabled local governments to control the flow of waste out of their communities. The resulting local ordinances are commonly called "flow control." While the term "flow control" is used almost uniformly in the literature on this subject, in fact the broad range of local statutes which are described by this term are anything but uniform. The ordinance under scrutiny in this case, for instance, does not direct that waste be disposed of at any one facility, but simply directs that waste be routed through a transfer station on its way to incinerators or landfills. In addition, Clarkstown's regulation is not limited to waste generated within its borders. *Respondent's Brief in Opposition to Petition for Writ of Certiorari*, p. 7. The flow control statute in *Waste Systems Corp. v. County of Martin, Minn.*, 985 F.2d 1381 (8th Cir., 1993) required that all local *organic* waste go to a local

composting facility. One of the flow control statutes in *Waste Recycling v. Southeast Alabama Waste Disposal Authority*, 814 F. Supp. 1566 (M.D. Ala., 1993) required local waste to go to an incinerator unless it was destined for interstate commerce.

Despite these differences, flow control ordinances have a common background against which they arose, i.e., resolving the solid waste management problems facing this country. The ability to designate the ultimate destination of local waste is a critical tool enabling municipalities and local governments to implement needed solutions to the solid waste dilemma. The *Amici* States have a strong interest in protecting their local governments' ability to implement these solutions.

SUMMARY OF ARGUMENT

The *Amici* States urge the Court to uphold the Clarkstown ordinance. The ordinance requires that all waste generated or disposed in Clarkstown be sent through a designated transfer facility. This ordinance is an example of a local regulation governing the flow of trash out of a community, colloquially known as flow control. As a core example of the exercise of a local government's fundamental police powers, flow control is entitled to wide deference. Further, as flow control ordinances generally regulate only local waste before it is placed into interstate commerce, they have no impact on the interstate flow of waste. They are thus distinguishable from the laws struck down in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S.Ct. 2019 (1992), *Chemical Waste Management v. Hunt*, 112 S.Ct. 2009 (1992) and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) on Commerce Clause grounds. The Commerce Clause does not reach the local regulation of a local problem.

Even if this Court finds, however, that the local ordinance does have an impact on interstate commerce, the ordinance should still be upheld under the test established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Flow control

ordinances serve vital governmental interests, are even-handed, do not result in economic protectionism, and have minimal impact on interstate commerce. Because the significant benefits of flow control far outweigh any burden, the ordinance is a legitimate exercise of police power and should be upheld. The Clarkstown ordinance, and other ordinances like it, have been enacted as part of comprehensive state statutory programs which respond to the serious garbage disposal problems facing this country. The problems include, *inter alia*, the steadily increasing amount of waste being generated, and the need to find alternatives to landfills. Flow control ordinances are not mere attempts to protect or improve local industry or employment at the expense of interstate commerce. Even to the extent such laws attempt to ensure the viability of a designated facility, they do so as an integral part of a community's attempt to deal with its long-term waste disposal problem.

Finally, even if the Court finds that the ordinance does discriminate against interstate commerce, it should still be upheld under the standards set out in *Maine v. Taylor*, 477 U.S. 131 (1986). Clarkstown s ordinance and others like it are part of comprehensive statutory schemes which were enacted to serve critical governmental interests. As there are no other nondiscriminatory alternatives which will serve those interests, this Court should uphold the statute even if it finds the statute is discriminatory.

ARGUMENT

I. A LOCAL LAW DIRECTING THE FLOW OF GARBAGE, GENERATED OR COLLECTED LOCALLY, THROUGH A DESIGNATED TRANSFER FACILITY IS WHOLLY WITHIN THE AUTHORITY OF A LOCAL COMMUNITY TO REGULATE THE COLLECTION AND DISPOSAL OF GARBAGE, AND DOES NOT IMPACT INTERSTATE COMMERCE.

A. The Courts Have Long Respected The Authority Of Local Communities To Impose Regulations Governing The Collection And Disposal Of Local Garbage.

This Court has long recognized the power of local government to regulate the collection and disposal of the local community's waste, and has recognized that states have a "substantial interest in . . . easing solid waste disposal problems." *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 473 (1981). Much like a local government's provision of police and fire services, or highway maintenance, garbage disposal is a traditional exercise of local authority. Fundamentally different than a ban on the importation of out-of-state waste into neighboring private landfills, the exercise of this traditional local authority does not even concern the regulation of waste as an item of interstate commerce.

In *California Reduction Company v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306 (1905), the Court upheld a San Francisco ordinance granting to a private individual the sole and exclusive right to cremate and destroy various household, commercial, and construction wastes in the city and county of San Francisco. The ordinance also required that any such wastes be delivered to one designated crematorium operated by the grantee or his assigns.

When sued for violating this ordinance, a competing disposal company and the haulers it employed challenged the San Francisco ordinances as being in violation of the Fourteenth Amendment to the United States Constitution. This Court rejected the challenge, holding that the collection and disposal of garbage was squarely within the localities' police power. *Id.* at 318.

The Court went on to discuss in detail the many questions involved in municipal sanitation and the difficulty of solving these questions. As part of this discussion, the Court recognized, even in 1905, the numerous problems posed by the collection and disposal of waste, and acknowledged

that a local government is in the best position to provide solutions to those problems. *Id.* at 321.

The Court also specifically addressed the claims of other persons competing in the collection and disposal business. The Court noted that the "licensed scavenger," a counterpart of today's waste haulers and disposal facilities, had no "right to complain for his right to convey garbage and refuse through the public streets, . . . was derived from the public, and he was subject to such regulations as the constituted authorities, in their exercise of the police power, might adopt." *Id.* at 322. *See also Gardner v. Michigan,* 199 U.S. 325 (1905) (Court upheld, against a Due Process challenge, a law granting one individual exclusive refuse collection and disposal rights.)

Following *California Reduction Company,* courts have repeatedly upheld legislation governing the collection and disposal of local trash. In *Hybud Equipment Corporation v. City of Akron,* 654 F.2d 1187 (6th Cir., 1981) *vacated and remanded on other grounds,* 455 U.S. 931 (1982), the United States Court of Appeals for the Sixth Circuit stated:

> Control of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional, paradigmatic example of the exercise of municipal police powers. . . . If any area of the law can be said to be well settled, this one is.

654 F.2d. at 1192 *See generally, Validity of Statutory or Municipal Regulations As To Garbage,* 15 A.L.R. 287 (1921), 72 A.L.R. 520 (1931), and 135 A.L.R. 1305 (1941); and *Validity of Municipal Regulation of Storage or Accumulation of Lumber, Straw, Trash, or Similar Inflammable Material,* 64 A.L.R. 2d 1040 (1959). Courts have consistently upheld laws reserving to the community, or granting to one individual or company, the exclusive right to collect and dispose of garbage in the community. *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency,* 715 F.2d 419 (8th Cir., 1983) *cert. denied,* 471 U.S. 1003 (1985);

Gurtz v. San Bruno, 8 Cal. App. 2d 399, 48 P.2d 142 (1935); *Indianapolis v. Ryan,* 212 Ind. 447, 7 N.E.2d 974 (1937); *Portsmouth v. McGraw,* 21 Ohio St. 3d 117, 488 N.E. 2d 472 (1986); *Salt Lake City v. Bernhagen,* 56 Utah 159, 189 P. 583 (1920).

Throughout this century, therefore, courts have sanctioned local waste management laws nearly identical to the "flow control" ordinances now attacked as if they were a recent invention designed to impermissibly burden interstate commerce. These laws, however, did not in the past, and do not now, impermissibly impact interstate commerce.

B. Flow Control Laws Such As the Clarkstown Ordinance Do Not Impact Interstate Commerce.

In urging this Court to discard nearly a century's worth of precedent, Petitioners argue as if the Commerce Clause prevents local regulation of the collection and disposal of local trash from the moment the discarded milk carton, cardboard box, or candy wrapper leaves the hand of the consumer. This Court's decisions concerning the interstate movement of solid waste do not require such a result, however. In fact, a review of those authorities leads to the conclusion that the Clarkstown ordinance and other ordinances like it, do not even affect interstate commerce because they regulate waste that has not entered the stream of interstate commerce.

It was not until 1978 that the Court was faced with the issue of waste as an item of interstate commerce. Even then, however, in the seminal case of *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978), this Court was asked to apply the Commerce Clause to waste which had already been offered up and placed into interstate commerce. Similarly, in the more recent *Chemical Waste Management v. Hunt,* 112 S.Ct. 2009 (1992), and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources,* 112 S.Ct. 2019 (1992), the Court again reviewed statutes which attempted to regulate waste that had already left its respective community of origin and been placed into interstate

commerce. Indeed, in all these cases, the challenged legislation attempted to uniquely address certain waste *because* of the wastes' interstate and out-of-state character. None of these cases involved a local or regional community attempting to address the basic, age-old problem of collection and disposal of the waste which the community itself generates or collects.

The notion that an item has not yet entered the interstate stream and is therefore not subject to the Commerce Clause is well recognized in the decisions of this Court. Although the Court has not addressed this question in the waste context,[1] it has addressed it in the context of other substances. In *Parker v. Brown,* 317 U.S. 341 (1943), the Court was faced with a challenge to a California statute requiring raisin producers to place seventy percent of saleable raisins into a surplus pool under the control of state officials. The state officials then sold raisins from the pool when they felt it was necessary to stabilize the price of raisins. While acknowledging that ninety to ninety-five percent of the raisin crop was eventually sold in interstate and foreign commerce, the Court held that the challenged law involved regulation of *intrastate* commerce even though the raisins were headed for *interstate* commerce:

> [N]o case has gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer, after processing and packing them, will, in the normal course of business, sell and ship them in interstate commerce.
>
> All of these cases proceed on the ground that the taxation or regulation involved, however drastically it may affect interstate commerce, is nevertheless

[1] However, in *Philadelphia, supra,* the Court was careful to frame the question of the scope of coverage of the Commerce Clause, not as whether waste was an item of interstate commerce, but whether the "*interstate movement* of those wastes" was commerce. 437 U.S. at 621 [Emphasis added].

> not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce occurs.

Id. at 361. The Court held that the challenged regulations were valid under the Commerce Clause because they applied to transactions "wholly intrastate before the raisins are ready for shipment in interstate commerce." *Id.* at 361.[2] In addition to finding a distinction between local and interstate commerce, the Court stated that its decision also rested on the "accommodation of the state and national interests involved." 317 U.S. at 362. Weighing these interests, the Court upheld the regulations:

> [B]ecause upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress.

Id. at 362-363. The Court noted that the production and marketing of raisins posed a problem local in character and

[2] As another example of the distinction between interstate and intrastate commerce in an item, in *Foster-Fountain Packing Co., Inc., v. Haydel,* 278 U.S. 1 (1928), striking down a Louisiana law which effectively required shrimp taken in its territorial waters by private fisherman to be processed in Louisiana, the Court nonetheless noted that the state might have "retained the shrimp for consumption and use therein. . . . But by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the state necessarily releases its hold." *Id.* at 13. Only when the state terminated its control did "those taking the shrimp . . . thereby become entitled to the rights of private ownership and the protection of the commerce clause." *Id.* at 13. The Court repeated this position twenty years later in *Toomer v. Witsell,* 334 U.S. 385, 404-405 (1948). While this Court later largely discarded the theory of state ownership of natural resources, *Hughes v. Oklahoma,* 441 U.S. 322 (1979), the Court has not discarded the distinction between articles placed in interstate commerce and those not yet placed in interstate commerce.

urgently demanding state action in light of the importance of the industry and the existence of spectacular and unsettling price fluctuations. *Id.* at 363.

The waste disposal problem facing Clarkstown and other local communities across the nation is also a problem of local character urgently demanding state or local action. While Petitioners may argue they can supplant local government in its well-established role of providing for the collection and disposal of trash in that local community, such an argument ignores the traditional, judicially-recognized responsibilities and authorities of local and regional governments for the collection and disposal of garbage. Indeed, the next step for private industry would be to argue that the Commerce Clause gives them a constitutional right to compete with governments for the provision of police or sewer services. Those services, too, could be provided, for example, by an interstate security firm or sanitation company. The Commerce Clause should not limit the actions of local governments in regulating local waste that has not entered interstate commerce.

II. EVEN IF THE CLARKSTOWN ORDINANCE AFFECTS INTERSTATE COMMERCE, THE ORDINANCE, AND OTHER WASTE MANAGEMENT LAWS THAT AUTHORIZE FLOW CONTROL, ARE EVEN-HANDED LAWS THAT ARE AN INTEGRAL PART OF A STATUTORY PROGRAM TO PROTECT THE PUBLIC HEALTH AND WELFARE, AND DO NOT IMPERMISSIBLY BURDEN INTERSTATE COMMERCE.

Even if it can be shown that Clarkstown ordinance affects interstate commerce in some way, it is well established that a law does not violate the Commerce Clause merely because

it affects interstate commerce. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 448 (1960).[3] The States have retained broad regulatory authority in the area of police power matters.

Even in striking down a total ban on the importation of solid waste, the Court acknowledged that incidental burdens on interstate commerce may be unavoidable where a State legislates to protect its citizens. *Philadelphia, supra*, at 623-624. As this Court more recently expressed:

> The Commerce Clause . . . does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation, [Citation omitted] . . . it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

Maine v. Taylor, 477 U.S. 131, 151 (1986).

In evaluating whether a given law constitutes permissible police power regulation under the Commerce Clause, the Court has not applied a mechanical or clinical approach. The Court has examined the motivation behind a challenged statute, whether it openly discriminates against interstate commerce, the local interests it serves, and the relative burden it imposes. A fundamental goal of this examination is to distinguish between those laws that are economically protectionist in nature and that attempt through parochial

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[3] One area of permissible regulation is in matters of traditionally local concern. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) ("A State's power to regulate commerce is never greater than in matters traditionally of local concern.") As just established, the local collection and disposal of trash is just such an area of traditional concern. Thus, even if the regulation of the collection and disposal of local trash is held to have any impact on interstate commerce, the traditionally local nature of that regulatory authority merits wide latitude under the Commerce Clause.

legislative means to protect or improve local industry or employment, from those laws that are founded upon legitimate health, welfare, or environmental concerns and only incidentally affect commerce.

Consequently, in examining and balancing these factors, the Court has used two tests. The Court has used lesser scrutiny "where a statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Such a statute "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. In contrast, laws that openly and arbitrarily discriminate against interstate commerce as a means of responding to local concerns, or those laws "motivated solely by a desire to protect local industries from out-of-state competition," will be strictly scrutinized by the Court. *Maine v. Taylor*, 477 U.S. at 148, n. 19. Such laws may be justified, however, where a State can show that the law serves a legitimate governmental purpose that cannot be served as well by available nondiscriminatory alternatives. *Id.* at 138.

When examined under these tests, flow control ordinances fall firmly within the broad regulatory authority retained by the States for police power enactments. Such laws are integral parts of comprehensive statutory programs enacted by state and local governments for legitimate safety, health and environmental concerns to address significant problems of waste disposal. These laws are not illusory, fabricated attempts to protect or improve local industry or employment at the expense of interstate commerce. Even to the extent such laws serve a purpose of attempting to ensure the viability for a community of a given designated facility, they do so as an integral part of a community's attempt to deal with its long-term waste disposal problem.

Not only are flow control laws legitimate police power enactments designed to serve important governmental interests, they also are even-handed regulations with an only incidental impact on interstate commerce. Consequently,

they should be upheld as Petitioners cannot show that Clarkstown ordinance imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

A. The Clarkstown Ordinance And Other "Flow Control" Laws Serve Important Governmental Interests And Are Integral Parts Of Comprehensive Police Power Enactments For The Local Management Of Solid Waste.

The enormous problems facing this country in safely disposing of its solid waste have been evident for years. In 1976, Congress first enacted the Resource Conservation Recovery Act (RCRA, 42 U.S.C. 6901, *et seq.*), in response to the overwhelming solid waste disposal problems facing the country. Since that time, the combination of a "throw away society," which is continually generating more trash and the growth of the NIMBY (Not In My Back Yard) movement, which has slowed the siting of new solid waste disposal facilities, has only increased the problems. *See* United States Environmental Protection Agency, Office of Solid Waste, *The Solid Waste Dilemma: An Agenda for Action* (1989). Further contributing to the difficulties is the consistent trend to constantly produce more solid waste; more garbage was produced every successive year from 1960 to 1988, both in total tonnage and in pounds per person. *Id.* at 1.

Amidst this glut of garbage, states have come to the conclusion that this country must find alternatives to landfills, a conclusion which Congress reached when it stated that "alternatives to existing methods of land disposal must be developed." 42 U.S.C. §6901(b)(8). The problems with extensive reliance on landfills are obvious. In many areas of this country, where land is scarce, it is a terribly inefficient use of natural resources. *See* 42 U.S.C. §6901(b)(1). Historically, landfills have been cheaper to build and operate in the short run than other disposal options. There are, however, enormous long-term costs associated with landfills, including potential dangers to human health and the environment. For these reasons, when the U.S. EPA

established a "hierarchy" of waste management options, it ranked landfills last. 40 C.F.R. 256.31(a)(1991). Many states have also established similar hierarchies.[4]

Although these problems are widespread, local governments have, again, historically dealt with the resolution of garbage problems and still have primary responsibility for dealing with solid waste. Congress deliberately left the problems in local hands by declining to preempt local regulation with a national solid waste regulatory program when it enacted RCRA. 42 U.S.C. § 6901(a)(4) ("the collection and disposal of solid wastes should continue to be primarily the function of state, regional and local agencies.") *See also*, Ann R. Mesnikoff, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste At Home*, 76 Minn. L. Rev. 1219 (1992).

Responding to mounting pressures of dealing with solid waste issues in an environmentally sound manner, numerous states have passed comprehensive solid waste management statutes. These statutes vary from state to state, but generally set state-wide standards and goals which are required to

[4] North Carolina has established a six tier solid waste hierarchy. In descending order the hierarchy is: waste reduction at source; recycling and reuse; composting; incineration with energy production; incineration with volume reduction; disposal in landfills. N.C. Gen. Stat. §130A-309.04 (1993). Minnesota establishes, in order of preference: waste reduction and reuse; waste recycling; composting of yard waste and food waste; resource recovery through mixed municipal solid waste composting or incineration; and, lastly, land disposal. Minn. Stat. §115A.02(b)(1992). Maine establishes the following hierarchy: waste reduction; reuse; recycling; composting; incineration; disposal in landfills. 38 Me. Rev. Stat. Ann. §2101.

be implemented on a local basis.[5] The state-wide goals often include recycling and reduction of waste. In addition, several states require local governments to engage in long-term planning. Adopting such a program is consistent with placing primary responsibility for municipal solid waste on local government.

These sweeping mandates attempt to address the roots of the solid waste problem, forcing communities to reduce the amount of trash which ends up in a landfill, thereby reducing reliance on landfills. In addition, by making communities plan for their long-term disposal capacity, the states force communities to work with landfills and incinerators realistically, in terms of ensuring adequate capacity.

As an integral part of many of these comprehensive solid waste management statutes, are the so-called flow control laws. These laws, which require waste to be delivered to designated facilities within a community, are enacted by local governments and authorized by State law to ensure that the overall goals of the comprehensive solid waste management

[5] While not an exhaustive list, the following are several examples. Ohio law requires counties to, jointly or singly, produce a plan which provides for a 25% reduction in generation of solid waste by 1994, through reduction, reuse and recycling, and to demonstrate access to at least ten years of disposal capacity. Ohio Rev. Code Ann. §§ 3734.50, *et seq.* (Page, 1993). In Pennsylvania, the goal is to recycle 25% of all municipal solid waste generated by 1997 and to produce less waste in 1997 than was produced in 1988. Pennsylvania also requires counties to demonstrate access to ten years of disposal capacity. 53 Pa. Stat. Ann §§4000.101-4001.1904 (1992). North Carolina's state goal is to reduce solid waste by 25% by 1993, and by 40% by 2001, and to achieve this goal through reduction, reuse, recycling, and composting. N.C. Gen. State § 130A-309.04 (1993). Virginia also has set escalating recycling goals, starting with 10% by 1991 and climbing to 25% by 1995. Va. Code Ann. § 10.1-1411 (Michie 1993). Minnesota requires counties to prepare comprehensive plans, including the way in which the county will meet the state goal of recycling 25% of the solid waste generated by non-metropolitan counties and 35% by metropolitan counties by 1993. Minn. Stat. §115A.551 (1992).

statutes are met.[6] In short, local governments are being handed an extremely difficult mandate to reduce, recycle and plan for long-term disposal of solid waste, and flow control is one of the few tools available to achieve the mandate.

The specific governmental interests which have led to the adoption of flow control ordinances include: the need to accurately engage in long-term planning to avoid disastrous gluts and shortages in disposal capacity; the need to decrease reliance on landfills; and the need to finance recycling and composting programs in areas where the amounts of waste generated make it difficult to attract private facilities and to finance large, costly alternatives to landfills. Each of these interests will be addressed below.

1. Flow Control Enables Local Governments To Engage In Effective Long-Term Planning.

As discussed above, one of the goals of many state statutes on solid waste management is to require local governments to engage in long-term planning. The long-term planning usually requires, *inter alia*, demonstration of access to a certain number of years of capacity. The reason for requiring such planning is obvious: to avoid solid waste disposal capacity shortages and, conversely, capacity gluts.

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[6] Indeed, several states have expressly tied flow control to the overall purposes of solid waste management. Maine, for instance, allows municipalities to enact flow control "when the purpose and effect of such an ordinance is to gain management control over solid waste and enable the reclamation of resources, including energy, from these wastes." 38 Me. Rev. Stat. Ann. §1304-B. Virginia requires that before a county, city or town passes flow control, it must make certain findings, including that other facilities are inadequate, and that the ordinance is necessary to finance needed projects. Va. Code Ann. §15.1-28.01 (Michie 1993). Minnesota allows counties to adopt a designation ordinance only after preparing a plan which is consistent with the statutory goals. The plan must evaluate a number of criteria including whether there are less restrictive methods for ensuring an adequate supply of solid waste to the facility, and whether there are other feasible alternatives to the proposed designation. Minn. Stat. § 115A.84 (1992).

A combination of factors led to critical disposal shortages in many states. Those factors included the adoption of more stringent criteria for landfills, which resulted in the closing of many landfills; the political difficulties in building new landfills in many communities; and the ever increasing amount of garbage generated in this country. *See, Agenda for Action, supra*, p. 8. Gluts of disposal capacity, while less common, are also occurring. *See* Jeff Bailey, *Up In Smoke: Fading Garbage Crisis Leaves Incinerators Competing For Trash*, Wall Street Journal, August 11, 1993; Jeff Bailey, *Municipal Waste Disposal Investments Undermined By Federal Court Rulings*, Wall Street Journal, March 2, 1993; *Incinerators Hungry For Trash*, Providence Journal-Bulletin, May 27, 1993. An excess of disposal capacity can also have deleterious effects, including potentially driving prices down to such an extent that the disposal facility fails, leaving behind unresolved environmental and financial problems for the communities.

While such market swings may be acceptable and even desirable in traditional areas of commerce, cf. *Parker v. Brown, supra* at 363 (Court takes judicial notice of evils of market swings in upholding raisin pooling laws), the collection and disposal of garbage is too vital to the health and safety of a community. Courts have long recognized that safely collecting and disposing of garbage is a vital governmental concern, similar to providing police and fire protection. *California Reduction Company, supra; Hybud Equipment Corporation v. City of Akron, supra.*

Flow control allows a local government to avoid these destructive swings in capacity by allowing a local government to realistically assess local capacity options. The community can determine whether there exists sufficient local capacity, and if not, make plans to correct that situation.

2. Flow Control Allows A Community The Ability To Meet Its Goal Of Reducing Reliance On Landfills.

As discussed above, decreasing reliance on landfills is one of the important goals of solid waste management, both by the federal government and by many states.[7] One of the difficulties with achieving this goal, however, is that landfill disposal costs have been kept artificially low, because many old and existing landfills did not include in their up-front costs the ultimate cost of closing the landfill, monitoring the landfill during post-closure and cleaning up any post-closure environmental problems. Therefore, merely continuing to dispose of waste in the existing facilities without making long-range plans is only cheaper in the short run.

Thus if a community chooses to build or use an alternative to landfilling in order to effectuate its long-term policy choices, it must be able to implement that choice through flow control. Otherwise, short-term market forces may prevent attainment of the goals of solid waste management. The facts of *Waste Systems Corp. v. County of Martin, Minn.*, 985 F.2d 1381 (8th Cir., 1993) provide an excellent case study. In that case, two counties built a composting facility at a cost of eight million dollars. *See Waste Systems Corp. v. County of Martin, Minn.*, 784 F.Supp. 641 (D.Minn., 1992). Composting is clearly an important way to reduce the amount of waste being landfilled. *See Agenda for Action.*[8]

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[7] For instance, Minnesota has seven resource recovery facilities and several transfer stations that take waste to resource recovery facilities, all supported by flow control ordinances (called designation ordinances in Minnesota). None of Minnesota's designating ordinances require that waste be disposed of at a landfill. *Preliminary Assessment of Regional Waste Management Capacity*, Report to the Minnesota Legislature's Commission on Waste Management, by Minnesota Office of Waste Management, July 1993, Table 7-1, p. 73.

[8] "Recycling (including composting) is the preferred waste management option to further reduce potential risks to human health and the environment, divert waste from landfills and combustors, conserve energy, and slow the depletion of nonrenewable resources." *Agenda for Action*, p.2.

Nonetheless, the local ordinances were successfully challenged by an out-of-state landfill operator on Commerce Clause grounds. Thus, the local government's difficult choice to require that its citizens' waste be sent to the compost facility at an increased cost was overridden. The result is that approximately 25 to 30 tons of garbage per day are going to a landfill instead of a compost facility. *Service Fee Increase Likely As Praireland Loses Garbage To Iowa*, Fairmont Sentinel, March 14, 1992. The cheapest form of disposal is being used without consideration of environmental impacts or future capacity needs.

The attempt to shift solid waste disposal away from landfills is difficult, especially given the deceptively low apparent costs of landfilling. However, numerous governmental bodies have realized that in the long run such a move is necessary. Flow control is an important tool for achieving that difficult goal.

3. Flow Control Is Necessary To Finance Alternative Facilities.

Because landfill disposal costs remain deceptively and artificially low, it is difficult to build much needed, environmentally superior, long-term alternatives. This is true especially in areas where the flow of waste is low, or if a community or group of communities want to build an expensive, state-of-the-art facility. Obtaining the financing is difficult if the waste producers to be served by the alternative facility can choose to simply go to a cheaper, environmentally less sound landfill.

In some communities, flow control ordinances are the only way to attract private facilities for recycling and composting, or to finance construction of their own. In large urban areas, the flow of waste available makes it easier to finance a materials recovery facility, a composting facility, or other recycling facility. However, in some areas, the amount of waste available may make the economics of building and operating such a facility difficult. If the community can guarantee that all of the waste generated in the area will

be delivered to the facility, then the economics improve and the long-term viability of such a facility is more likely. Without flow control, it remains more likely that certain parts of the country will remain unserved by such facilities, defeating that community's ability to meet its recycling and composting mandate.

Flow control also enables communities to build expensive solid waste facilities that may not be feasible absent flow control, but which are environmentally superior to landfilling. Without a guaranteed flow of waste into the facility, it may become impossible to build such facilities even though alternatives to landfills may be less expensive to society in the long run. *See, Ability to Finance Recycling Facilities in California Could Hinge On Court Case,* The Bond Buyer, March 26, 1993; *see also Disposing of the Dormant Commerce Clause, supra.*

These last two reasons for enacting flow control, providing the means for some communities to provide for any alternatives to landfilling and providing the means for some communities to undertake ambitious alternative projects, have often been expressed by various legislatures in economic terms. The wording of such legislation has led to the false charge that these statutes are "economic protectionism". As discussed below, these statutes are not designed to protect a desirable industry; they are designed to enable a community to deal with a necessary evil, the garbage it generates. Nonetheless, in order to meet the mandate and achieve the vital goals of solid waste planning, a realistic view of the economics of solid waste disposal is needed.

The intertwining of the important governmental goals and the realities of the economics is demonstrated by Maine's statute enacting solid waste management including the ability for local governments to create flow control:

> [T]he State requires each municipality to provide for disposal services for domestic and commercial solid waste generated within the municipality. Solid waste contains valuable resources, including energy. . . . Energy recovery technology is complex and the equipment requires a steady supply of waste to operate efficiently. . . . *In order to make these energy recovery facilities financially feasible, and thereby simultaneously improve the environmental impacts and the economics of municipal solid waste disposal, municipalities shall have the legal authority to control the handling of solid wastes generated within their borders.*

38 Me. Rev. Stat. Ann. §1304-B(1) (emphasis added.). The statute goes on to expressly authorize municipalities to enact flow control "when the purpose and effect of such an ordinance is to gain management control over solid waste and enable the reclamation of resources, including energy, from these wastes." 38 Me. Rev. Stat. Ann. 1304-B(2). Thus, even though a statute might discuss flow control in terms of increasing the economic viability of a facility, it is clear that the underlying reason for the statute is fundamentally environmental, but because of high capital costs of alternative facilities, there are necessarily economic implications. As will be discussed in the next section, those costs will be borne by local citizens rather than out-of-state citizens.

Flow control serves vital government interests.[9] In short, flow control ordinances are being passed by communities as part of an overall effort to comprehensively deal with the solid waste crisis. Communities are under difficult mandates

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[9] The government's legitimate and paramount concern with long-term solutions to the problems of solid waste disposal in order to safeguard its citizens stands in contrast to industry's concerns. *Amici* National Solid Waste Management Association's ("NSWMA") brief states that flow control leads to inefficient and environmentally unsound waste disposal. The implication is clearly that the area of regulating flow control should be left to private market forces, engaged in fair competition. The irony of this argument is twofold: first, left to its own devices, the industry failed to avert the solid waste crisis facing this country; second, the industry has been plagued with serious antitrust and price-fixing problems.

to reduce their waste, increase their recycling, and generally plan for their long-term solid waste needs. The Commerce Clause clearly recognizes that such ordinances,which are even-handed and have only incidental burdens on interstate commerce, are valid.

B. Flow Control Statutes Are Lawful Even-Handed Regulations And Are Not Economic Protectionist Measures.

Not only do flow control statutes serve important governmental police power interests, but these laws do so in an even-handed manner. "Even-handedness" does not require that there be no impact on interstate commerce, but only that the challenged legislation apply equally to persons and items of commerce, regardless of the origin of the item of commerce. In *Head v. New Mexico Board of Examiners*, 374 U.S. 424 (1963), for example, the Court upheld a New Mexico statute that proscribed price advertising on optical goods. The Court reviewed the statute as an even-handed statute because it applied equally to all such advertising

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[9] *Footnote 9 cont.*

The purported efficiencies of private industry did not forestall the national capacity crisis, and have not resulted in meeting national goals in dealing with solid waste. Indeed, although there has been a national policy supporting waste reduction and recycling and urging a decreased reliance on landfills since 1976, 80% of the waste in this country is landfilled and only 10% is recycled. *See Agenda for Action, supra.*

In addition, industry's argument concerning fair competition rings hollow in light of the fact that the solid waste industry has been plagued with anti-trust violations. *See* Jeff Bailey, *Municipal Waste Disposal Investments Undermined By Federal Court Rulings*, Wall Street Journal, March 2, 1993 ("A series of successful civil and criminal price-fixing cases against the two largest haulers, Waste Management Inc. and Browning-Ferris Industries, furthered the distrust [of local officials].") *See also Trade Waste Management Association v. Hughey*, 780 F.2d 221, 223 (3rd Cir., 1985) (which describes the development of New Jersey's solid waste law against a background of organized crime, price-fixing, and extortion.)

within the borders of New Mexico, whether applied to price advertising was done by a New Mexico optometrist or an out-of-state optometrist. In *Huron, supra,* the Court upheld boiler regulations as even-handed, as uniformly applied to ships engaged in interstate commerce.

Ordinances that direct that all waste in a locality go to a designated facility are similarly evenhanded, in that they generally apply equa.ly to all waste generated or collected within the community. There is no arbitrary or disparate treatment for waste coming from outside the State. Nor do such ordinances apply only to waste purportedly targeted for out-of-state disposal as opposed to in-state disposal. Finally, the fee charged at the designated facility is even-handedly assessed.

Flow control also displays none of the attributes of laws invalidated by this Court as "economic protectionist" measures. The Clarkstown ordinance, for example, does not display the type of discrimination struck down in *City of Philadelphia, Fort Gratiot, and Chemical Waste Management.* In those cases, the challenged legislation expressly treated out-of-state waste differently and less advantageously than in-state waste. In *City of Philadelphia and Fort Gratiot,* the challenged statutes banned out-of-state waste, but did not ban in-state waste from going into in-state or in-county landfills. In *Chemical Waste Management,* the challenged statute charged one fee for in-state waste disposed at in-state facilities and a substantially larger fee for waste generated out-of-state. Consequently, the critical inquiry was whether there was a difference between out-of-state waste and in-state waste, other than place of origin, sufficient to justify the difference in treatment. Either by concession, *Philadelphia,* at 629, or lack of evidence, no such justifiable difference was found.

This Court nevertheless recognized in *Philadelphia* that a State could act to reduce the flow of *all* waste even though interstate commerce may be incidentally affected. 437 U.S. at 626. It was the arbitrary discrimination of the regulation

which was objectionable. That discrimination does not exist here.

Flow control statutes are also fundamentally different from importation bans and statutes in that flow control laws do not try to cut off local resources from enjoyment by out-of-state citizens and do not seek to hoard a positive benefit such as disposal capacity. In *Fort Gratiot, supra*, this Court found a solid waste import ban to be unconstitutional, because it sought to isolate a State from the national economy and conserve local waste disposal capacity from out-of-state generators seeking to use the same disposal capacity. *Id.* at p. 2024. In contrast, the Clarkstown ordinance and other flow control ordinances do not put local waste generators at any advantage over out-of-state waste producers.

The flow control ordinances are also not "motivated solely by a desire to protect local industries from out-of-state competition." *Maine v. Taylor, supra* at 148, n. 19 . Flow control laws have neither the design nor effect of protecting or promoting local industry. *Amici* States agree with Petitioners' assessment that initially no local community wanted trash, a desire that led to import bans and other discriminatory legislation, much of which has been struck down by the courts. However, Petitioners, statements become illusory where they claim that some communities have changed their minds and now want trash. No community wants trash or the problems it creates.[10] It is inappropriate, therefore, to compare flow control laws to the numerous "local processing" cases where the States were motivated by economic protectionist reasons. *Pike v. Bruce Church, Inc.*,

[10] As noted in *Agenda for Action, supra*, the "First Law of Garbage is: 'Everybody wants us to pick it up, and nobody wants us to put it down.' Many Americans want their trash to disappear quickly and quietly from their backyards and curbs, never to be seen or heard from again. And the *last* thing they want in their neighborhoods is a landfill, combustor or recycling center—all of which are associated in the public mind with noxious odors, possibly dangerous pollution and noisy traffic." *Id.* at p.8.

397 U.S. 137 (1970); *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1948); *Foster-Fountain Packing Co., Inc. v. Haydel*, 278 U.S. 1 (1928); *L.O. Johnson v. Haydel*, 278 U.S. 16 (1928); *Toomer v. Witsell*, 334 U.S. 385, 405 (1948); and *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984).

In these "local processing" cases, the challenged statutes had the stated or readily apparent purpose to promote or protect local industry and employment in those industries. *Pike v. Bruce Church, Inc., supra* (Law designed to promote reputation of local growers); *H.P. Hood & Sons v. DuMond, supra* (Law designed to prevent competition with local milk producers); *Foster-Fountain Packing Co., Inc. v. Haydel, supra, L.O. Johnson v. Haydel, supra*, and *Toomer v. Witsell, supra* (laws requiring local packing by in-state private industry to promote local employment and income of local shrimp, oyster or fish industry); and *South-Central Timber Development, Inc. v. Wunnicke, supra* (law mandates local processing of Alaskan timber placed on the open market to promote local processing of timber)."

It is to reduce health and safety risks, not to increase employment in the trash industry or to attract these businesses for commercial or economic reasons, that local communities have chosen flow control. Given a free choice, no community wants these businesses. Communities have only decided to provide for or participate in such facilities after examining (at their own initiative or pursuant to state mandate) the full health and environmental effects of a failure to fully plan management of the community's waste.

Another indication that flow control laws are not economic protectionist, is that comprehensive solid waste statutes including flow control almost invariably increase the local costs of disposal. *See* Dexter Ewel, *Flow Control and Waste*

[11] Moreover, in these cases there is no element of the historical central role played by local government in regulating the items of commerce at issue, as there is with waste collection and disposal. There is simply no governmental counterpart in the fish or shrimp canning or timber processing industries.

Import Bans, Biocycle, March 1993. This increase is based on a number of factors, including that the designated facility is often more environmentally protective, and thus more expensive than cheaper, less protective alternatives.

Consistent with these increased costs, perhaps the best evidence that flow control ordinances are not economic protectionism is that the persons bearing the brunt of such laws are those with the political power to change them. As this Court has noted, a statute which burdens the State's own citizens does not raise the same Commerce Clause considerations as one which advances its own citizens at the expense of other States. *Kassel v. Consolidated Freightways, supra.* The reason is obvious - the State's voters will ensure that the regulations do not become too burdensome.[12] If a statute favors local interests at the expense of non-voting outsiders, there is nothing in the state political process to slow down the regulations.

In the case of flow control, however, local communities are bearing the financial brunt of their own decisions. As the United States Court of Appeals for the Sixth Circuit Court of Appeals recognized in upholding flow control regulations in *Hybud, supra*, there is a critical difference between such regulations and the import ban struck down in City of Philadelphia:

> It [the flow control ordinance] is not special interest legislation that discriminates against out-of-town people who vote elsewhere in favor of local residents and local voters. The economic costs of

[12] In *Kassel, supra*, at 1319, the Court noted that where the economic burden falls on local economic interests, as well as other states' economic interests, the "State's own political processes will serve as a check against unduly burdensome regulations." In addition, the "existence of major in-state interests adversely affected by the [law] is a powerful safeguard against legislative abuse." *Clover Leaf Creamery Co., supra* at 473, n. 17; *accord J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection*, 857 F.2d 913 (3d Cir., 1988).

> the Akron measure fall hardest on people who generate and collect garbage in the City of Akron.

654 F.2d at 1194-1195. Similarly, the Clarkstown ordinance should be upheld as it too is not an "economic protectionist" law which transfers the burden of the law to interstate commerce.

C. The Clarkstown Ordinance And Flow Control Laws In General Do Not Impose A Burden On Interstate Commerce That Is Clearly Excessive In Relation To The Benefits Of Those Laws.

The successful challenger of even-handed legislation must show, not just the existence of *any* impact on interstate commerce, but a burden that is "clearly excessive in relation to the putative local benefits." *Pike, supra*, at 142. Petitioners have failed to make such a showing. The Amici States generally concur with the arguments of Respondent addressing the purported impacts of the specific Clarkstown ordinance on interstate commerce. A few points of general relevance to flow control laws should be mentioned, however.

The purported burden of a higher fee at a designated facility is not an impermissible burden on interstate commerce. A higher fee, when and if it exists, is generally a reflection of the true long-term cost of the community's waste disposal problem. Those costs discussed in Section II.A. of this Amicus Brief—gluts and shortages in disposal capacity, inability to plan for waste disposal needs, high threshold costs for disposal and recycling facilities, inability to direct wastes to landfilling alternatives—are all part of the true long-term cost of waste disposal which flow control laws attempt to address.

Moreover, any higher fee charged when a community channels waste through a designated facility is primarily a cost borne by the local citizens of the community imposing the flow control restriction. This is wholly unlike the cost that may be added to, say, fish or shrimp or timber that is forced to be processed locally. That added cost is *carried*

with the product into interstate commerce and is borne by the *interstate consumer* of the good. With trash, there is no interstate *consumer* of trash, only purveyors of disposal or recycling capacity. The price of their disposal or recycling capacity, however, will not change depending on whether the local community has channeled the waste through a transfer facility and assessed themselves the added cost of that facility designation.

Claiming that a higher fee will cause more illegal dumping, as Petitioners argue, is pure speculation. Designation of a facility, and the attendant improvement in knowledge as to how much waste is being generated, may *improve* enforcement efforts against illegal disposers.[13]

Flow control also will not eliminate price competition or discourage new entry into the waste disposal business in an area. Nothing will prevent a community from recognizing a cheaper or more environmentally efficient way of disposing or recycling of waste. In small communities, flow control can even encourage entry as it allows a sufficient stream of recyclable or other waste to be consolidated so as to make it worthwhile for a private facility to address the market.

Finally, to the extent that an added cost is borne by out-of-state waste as a result of a flow control provision, such a burden is permissible under the Commerce Clause. This Court has repeatedly stated that the Commerce Clause does not relieve those engaged in interstate commerce from bearing their fair share of the cost of state government. *Dept. of Revenue of the State of Washington v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 745, 748 (1978); *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977); *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108 (1975). The fair share pronouncements of this Court in these cases, and in cases such as *Philadelphia* that a State can choose to slow the

[13] Moreover, even if there was an increase in illegal dumping, Petitioners do not state how that increase burdens interstate commerce or how it even relates to the analysis under the Commerce Clause.

flow of *all* waste, make clear that the Commerce Clause does not elevate interstate commerce in waste to a regulation-free status.

III. EVEN IF THIS COURT FINDS THAT FLOW CONTROL STATUTES ARE DISCRIMINATORY, THEY SHOULD STILL BE UPHELD BECAUSE THERE ARE NO NONDISCRIMINATORY ALTERNATIVES WHICH ALLOW GOVERNMENT TO ACHIEVE ITS IMPORTANT SOLID WASTE MANAGEMENT GOALS.

Even if this Court were to find that flow control ordinances discriminate against interstate commerce, this regulation should still be upheld. As has been demonstrated, *supra*, flow control ordinances clearly serve numerous, important governmental interests. The next question becomes whether these interests can be served as well by nondiscriminatory alternatives. Petitioners suggest that alternatives include keeping the designated facility competitive in the market and raising taxes as needed to subsidize the facility.

Amici States will again concur with the arguments of Respondent in support of the Clarkstown ordinance. As a general response, however, the Amici States emphasize that flow control laws serve governmental interests in planning, in directing the local waste stream to environmentally superior landfills and to recycling or other landfill alternatives, that a simple tax assessment cannot. In addition, a tax does not encourage the reduction of waste as requiring customers to pay the true cost of waste disposal does. As a mechanism for addressing the cost of waste management, flow control can serve to charge directly to the waste problem the true costs of long-term and environmentally sound waste management. In short, flow control laws, better than a simple tax subsidy, allows a community to build or use the type of facility it feels is the most appropriate in meeting its mandated goals.

CONCLUSION

For the foregoing reasons, the *Amici* States urge this Court to affirm the lower court decision on behalf of Respondent Clarkstown.

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